

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RALPH MILLER,

No. C 02-2118 MJJ (MEJ)

Plaintiff(s),

vs.

**ORDER RE: DEFENDANT'S MOTION
TO BAR PLAINTIFF FROM CALLING
DR. JERALD UDINSKY AS AN EXPERT
WITNESS**

INTERNATIONAL BUSINESS MACHINES,

Defendant(s).

Before the Court is defendant International Business Machines' ("IBM") motion to bar plaintiff Ralph Miller from calling Dr. Jerald Udinsky as an expert witness, filed June 30, 2006. Doc. #590. Upon review of the parties' papers in support of and in opposition to IBM's motion, the Court shall defer ruling on the motion pending the following:

- 1) Although Dr. Udinsky provided general case names and cities in which the cases were filed, his report fails to provide enough information for IBM to determine the type of claim presented and locate any recorded testimony. Accordingly, within two weeks from the date of this Order, Miller shall serve on IBM and file with the Court an amended list that provides the names of all parties, the case numbers, and the specific courts or administrative agencies in which the cases were heard. *See Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 682 (D. Kans. 1995); *Palmer v. Rhodes Machinery*, 187 F.R.D. 653, 655-56 (N.D. Ok. 1999). Miller's failure to provide this information within two weeks favors sanctions.
- 2) IBM argues that Dr. Udinsky testified that he routinely destroys his expert reports or testimony and could not supply any of this information. However, Federal Rule of Civil Procedure 26 creates a duty "retain whatever materials are given him to review in preparing

1 his testimony . . . because such materials often contain effective ammunition for cross-
2 examination." Fed. R. Civ. P. 26(a)(2), Adv. Comm. Notes to 1993 Amendments; *see also*
3 *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745,
4 750-751 (7th Cir. 2005). Thus, within two weeks from the date of this Order, Miller shall
5 serve on IBM and file with the Court a declaration from Dr. Udinsky attesting as to (a)
6 whether he retained any materials, reports, and testimony from previous cases, and (b) his
7 document retention policy in compliance with Rule 26.

8 After Miller files the amended list and Dr. Udinsky's declaration, the Court shall permit
9 additional briefing. IBM may file a brief within three days from the date Miller files the list and
10 declaration, and Miller may file a response within three days from IBM's brief. The parties' further
11 briefing shall be no more than five pages and the Court shall not consider any briefing other than
12 what it permitted in this Order.

13 **IT IS SO ORDERED.**

14
15 Dated: July 19, 2006



16 MARIA ELENA JAMES
17 United States Magistrate Judge
18
19
20
21
22
23
24
25
26
27
28